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In The

Supreme Court of the United States

October Term, 1986

JOHN LYLE HALL,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

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QUESTION PRESENTED

Whether contemporary community standards are to be applied to the value element of the tripartite test for obscenity articulated in *Miller v. California*, 413 U.S. 15 (1973).

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In The

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JOHN LYLE HALL,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

The petitioner, JOHN LYLE HALL, prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Second District, entered on March 17, 1986.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Second District, is reported at 143 Ill.App.3d 766, 491 N.E.2d 757 (1986). A copy of the opinion is included in the Appendix as Exhibit A.

JURISDICTION

Jurisdiction in this case is premised upon 28 U.S.C. § 1257(3) for review by certiorari of a decision of the Illi-

nois Appellate Court, Second District. A written opinion was issued by that court on March 17, 1986. Petitioner sought rehearing from the Second District Appellate Court, which was denied on May 5, 1986. A copy of the denial of rehearing is included in the Appendix as Exhibit B. The petitioner sought timely leave to appeal to the Illinois Supreme Court, and on October 2, 1986, his petition was denied. A copy of the order denying leave to appeal is included in the Appendix as Exhibit C. Petitioner filed an affidavit of intent to seek review in the United States Supreme Court and a motion to stay the mandate with the Illinois Supreme Court, and on October 14, 1986, his motion was granted. A copy of the Illinois Supreme Court's order staying the mandate is included in the Appendix as Exhibit D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First and Fourteenth Amendments to the Constitution of the United States, and the Illinois Obscenity Statute, Ch. 38, § 11-20, Ill.Rev.Stat. (1983), are set forth in the Appendix as Exhibits E and F.

STATEMENT OF THE CASE

On June 21, 1984, the petitioner, an employee of the Sunset Drive-in Theater in Rockford, Illinois, was charged with the offense of obscenity as a result of the sale of one magazine entitled "Tricking" to a Winnebago County Deputy Sheriff on the same date. The theater restricted its attendance to adults only above the age of 18 years, and the ticket booth at the theater entrance served as a check-

point for proper age identification. Within the concession area of the theater was a book area where magazines were available for purchase by the theater patrons.

A motion to dismiss was filed in the case, asserting that the Illinois Obscenity Statute was unconstitutionally vague, indefinite, uncertain, and overbroad, and was therefore violative of the petitioner's First and Fourteenth Amendment rights under the Constitution of the United States. Included within the petitioner's constitutional argument was the assertion that the statute failed to require that the third prong of the tripartite test for obscenity, as pronounced in *Miller v. California*, 413 U.S. 15 (1973), was to be adjudged on an objective basis, as opposed to reference to contemporary community standards. The motion to dismiss was denied by the trial court.

After a jury trial the petitioner was found guilty of the offense of obscenity. Petitioner's trial motion for a directed verdict again raised the question of the constitutionality of the Illinois Obscenity Statute by its allegation of error in the trial court's denial of the motion to dismiss. Jury instructions that were tendered at the trial included recitation of existing Illinois law under the obscenity statute, that community standards applied to the determination of obscenity *in toto*. The petitioner's timely post-trial motion preserving the constitutional issues raised about the Illinois Obscenity Statute was denied by the trial court.

Petitioner appealed to the Second District Appellate Court for the State of Illinois, and continued to assert the constitutional issues relating to the Illinois Obscenity Statute. In rejecting the petitioner's assertion on the unconstitutionality of the statute and the issue of the application of contemporary community standards to the third

element of the test for obscenity, the appellate court relied on its holding in *People v. Pope*, 138 Ill.App.3d 726, 486 N.E.2d 350 (1985), cert. granted *Pope v. Illinois*, — U.S. —, 107 S.Ct. 61 (1986). The court specifically rejected the contention that the holding of the Wisconsin Supreme Court in *State v. Princess Cinema of Milwaukee, Inc.*, 96 Wis.2d 646, 292 N.W.2d 808 (1980), should be accepted by them as a ground to invalidate the Illinois Obscenity Statute. The Second District Appellate Court affirmed petitioner's conviction, and denied his petition for rehearing.

A timely petition for leave to appeal was filed in the Illinois Supreme Court, again raising the constitutional issues relating to the Illinois Obscenity Statute. Leave to appeal was denied, and the mandate of the Illinois Supreme Court was stayed pending review by this Court.

REASONS FOR GRANTING THE WRIT

The Illinois Obscenity Statute, As Written And As Construed, Fails To Require That The Third Element Of The Tripartite Test For Obscenity, As Articulated In Miller v. California, 413 U.S. 15 (1973), Be Adjudged On An Objective Basis.

This case presents an additional opportunity for this Court to address the question of whether the third prong of the test for obscenity announced in *Miller v. California*, 413 U.S. 15 (1973), is to be adjudged on an objective basis, as opposed to the application of contemporary community standards. On October 6, 1986, this Court granted certiorari in *Pope v. Illinois*, — U.S. —, 107 S.Ct. 61 (1986), to resolve an identical issue.

In *Miller v. California*, 413 U.S. 15 (1973), this Court abandoned the "utterly without redeeming social value" standard articulated by *Memoirs v. Massachusetts*, 383 U.S

413 (1966). The Court in *Miller* retained the first two elements of the test for obscenity set forth in *Memoirs* and its progeny, the "prurient interest" and "patently offensive" elements, but established a new value element which provided that "the work, taken as a whole, lacks serious literary, artistic, political or scientific value." While the Illinois Obscenity Statute has been construed to include the *Miller* standards, the Illinois Supreme Court has continued to adhere to the "utterly without redeeming social value" standard. *People v. Ridens* (*Ridens II*), 59 Ill.2d 362, 321 N.E.2d 264 (1974), cert. denied 421 U.S. 993 (1975). In determining whether an objective test should be applied to the third element of the test for obscenity, however, it is not important whether the *Memoirs* or the *Miller* standard is utilized.

This Court in *Miller* voiced its intent that contemporary community standards were to be applied to the first two elements of the test, and recognized the distinction of the third element:

> Under a National Constitution, fundamental First Amendment limitations on the powers of the State do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.
>
> • • •
>
> The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent.
>
> 413 U.S. 30, 34.

Later, in *Smith v. United States*, 431 U.S. 291 (1977), this Court eradicated any doubt as to the application of community standards to only the first two prongs of the tripartite test:

> The phrasing of the *Miller* test makes clear that contemporary community standards takes on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. 413 U.S. at 26, 30, 93 S.Ct. at 2616, 2618. *See Hamling v. United States*, 418 U.S. at 104-105, 94 S.Ct. at 2900-2901. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in *Hamling* and in *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2740, 41 L.Ed.2d 642 (1974), the Court noted that part (b) of the *Miller* test contained a substantive component as well. The kinds of conduct that a jury would be permitted to label as 'patently offensive' in a § 1461 prosecution are the 'hard core' types of conduct suggested by the examples given in *Miller*. . . . Literary artistic, political, or scientific value on the other hand, is not discussed in *Miller* in terms of contemporary community standards.
>
> 431 U.S. at 301-02 (citations omitted).

Four circuit courts of appeal have conformed to *Smith* and have recognized the limitation of applying contemporary community standards to only the first two parts of the test. *United States v. Heyman*, 562 F.2d 316 (4th Cir. 1977); *Penthouse International Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980); *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982); and *United States v. Merrill*, 746 F.2d 458 (9th Cir. 1984), cert. denied — U.S. —, 105 S.Ct. 926

(1985). Two state supreme courts have reached a similar conclusion. *State v. Princess Cinema of Milwaukee Inc.*, 96 Wis.2d 646, 292 N.W.2d 808 (1980); *State v. Bartanen*, 121 Ariz. 454, 591 P.2d 546 (1979).

The failure of the Illinois Obscenity Statute, either as written or construed, to require that the third part of the test for obscenity be adjudged on an objective basis contravenes the constitutional principles from decisions of this Court, and conflicts with similar pronouncements from other courts which have addressed the issue. Indeed, even the Illinois legislature has recognized the omission of the statute. Subsequent to the conviction of the petitioner, a new obscenity definition was created by the Illinois General Assembly. Ch. 38, § 11-20, Ill.Rev.Stat. (1985), Public Act 84-709 effective January 1, 1986. A copy of this statute is included in the Appendix to this petition as Exhibit G. That amended statute substituted the *Miller* "laps" test for the "utterly without redeeming social value" standard and distinctly applied contemporary community standards to the "prurient interest" and "patently offensive" prongs of the tripartite test, but not to the value element. The definition of obscenity under the amended statute is as follows:

> Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken

> as a whole, it lacks serious literary, artistic, political or scientific value.
>
> Ch. 38, §11-20(b), Ill.Rev.Stat. (1985)

The Illinois Obscenity Statute under which John Hall was convicted presented a danger to protected speech. The magazine entitled "Tricking" that formed the basis of the charge in his case, lost constitutional protection notwithstanding its mild sexual depictions and theme under this statute and through application of community standards to all elements of the test for obscenity. In content, "Tricking" is homosexual in nature so that *a priori*, it is offensive to the mainstream of an Illinois statewide community. Only a value test that is independent of community standards could give this magazine a legitimate chance to survive under the First Amendment.

First Amendment principles require that the Illinois Obscenity Statute be invalidated as being overbroad and uncertain for its failure to ensure that the application of contemporary community standards is limited to only the first two parts of the tripartite test for obscenity. In *Pope v. Illinois*, cert. granted — U.S. —, 107 S.Ct. 61 (1986), this Court acknowledged the national significance of the identical issue presented by this petition. Under these circumstances, petitioner's conviction and petition to this Court presents the opportunity for additional contextual treatment of this important question.

—o—

CONCLUSION

This Court should grant a writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, Second District, because of the important First Amendment issue presented in this case.

Respectfully submitted,

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December 1986

APPENDIX

EXHIBIT A

No. 2-85-231

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

JOHN LYLE HALL,

Defendant-Appellant.

Appeal from the Circuit Court for the 17th Judicial Circuit, Winnebago County, Illinois.

Honorable John Nielsen

JUISTICE HOPF delivered the opinion of the court:

Defendant, John Lyle Hall, was charged with the offense of obscenity as a result of the sale of an allegedly obscene magazine. (Ill. Rev. Stat. 1983, ch. 38, par. 11-20(a)(1).) Defendant was found guilty by a jury and subsequently received a sentence of 140 days' imprisonment and a fine of $1,000. Defendant filed a timely notice of appeal.

In this court defendant contends: (1) that, where the defendant introduced public opinion evidence regarding community standards of the State of Illinois, the State was compelled to do more to sustain a conviction than introduce the allegedly obscene magazine into evidence;

(2) that the trial court erred in refusing to tender defendant's instruction No. 5 which related to evidence of community standards; (3) that the trial court erred in permitting the State to cross-examine the defendant's expert psychiatric witness about the prurient appeal of the allegedly obscene magazine; (4) that the trial court abused its discretion in imposing a sentence of 140 days' incarceration on defendant; and (5) that the Illinois obscenity statute is unconstitutional.

On the evening of June 21, 1984, Brian Harrison, who was employed as a deputy by the Winnebago County sheriff's department, went to the Sunset Outdoor Theater. After watching a movie, Harrison went to the concession stand at the theater. Within the concession stand was an area containing a counter displaying marital aid devices. On a three-tier bookshelf were displayed sexually explicit magazines. Harrison entered the book area where defendant, John Lyle Hall, was sitting at a counter, selected a magazine, entitled "Tricking," which depicted homosexual activity on its covers, approached defendant at the cash register, and placed the magazine face down on the counter. Defendant picked up the magazine, turned it over to get the price, rang the price up on the cash register, and then accepted payment for the magazine. Harrison took the magazine and left.

Lori Seagren, a crime scene technician, testified that on June 22, 1984, she went to the Sunset Outdoor Theater to take photographs of the bookshelf in the concession stand. Seagren stated that the magazines on the bookshelf were sexually explicit.

Defendant's first witness was Carl Hamann, a physician specializing in psychiatry. Hamann testified as to his experience in dealing with individuals who had sexually-related problems and his professional understanding of "sexually explicit materials," which he defined as the verbal expression or pictorial expression of explicit behavior. The witness defined prurient interests as an "abnormal interest in sex, excreta, and all the things related to sex." The witness stated that he had looked through the magazine, "Tricking," and that it depicted all positions and attempted contacts between homosexuals. Hamann testified that the attempted positions fell within the range of sexual conduct which he considered normal. In the witness' opinion the magazine, taken as a whole, did not appeal to the prurient interests of an average adult.

On cross-examination Hamann admitted that he had not read the storyline of the magazine but had merely looked at the pictures for about three minutes. The witness also related that he had never conducted any type of research or talked with individuals regarding sexually explicit magazines, such as the one in question, and that his conclusion that the magazine, "Tricking," did not appeal to an individual's prurient interest was his own opinion. The prosecutor showed Hamann various pictures in "Tricking," asking if they depicted a normal interest in sex. Defense counsel objected, arguing that the magazine must be taken as a whole in determining if it is obscene. The trial court overruled the objections, pointing out that the whole is the sum of the parts. Hamann then looked through the magazine, page by page, stating that none of the pictures were more likely to attract a prurient interest than any of the others. When asked if sexually

explicit materials apply to the prurient interests of individuals, the witness opined that they might sometimes "but not by and large."

On redirect, the witness was asked to read the story accompanying the pictures in the magazine, "Tricking." After reading the magazine, the witness stated that the words did not change his prior opinion regarding the appeal of the magazine to the average adult. On recross, Hamann was asked if it was his testimony that "Tricking" would appeal to a normal interest in sex. Hamann replied that the magazine would have little appeal to the average person but a greater appeal to homosexual individuals.

Defendant's next witness, John Breen, a legal investigator, testified that he had been employed by defense counsel to visit adult bookstores in Cook, DeKalb, McLean, Sangamon, and Peoria counties, to determine the availability and acceptability of sexually explicit materials in adult bookstores in Illinois. The witness described the exterior and interior of each bookstore he visited and the clientele he encountered in each, as well as the magazines he purchased in the stores. Breen stated that the materials purchased by him accurately contained pictorial portrayals of the sexual activity observed in publications and other materials available in each bookstore visited, including heterosexual and homosexual intercourse and anal and oral intercourse. Breen also testified that he had reviewed the magazine, "Tricking," and that, in his opinion, it was not as sexually explicit as the magazines he had purchased at the various bookstores. On cross-examination, Breen admitted that he had not read the

storyline in "Tricking." He also related that defense counsel had instructed him to purchase magazines depicting heterosexual, homosexual, and bisexual conduct.

Defendant's final witness was Roderick Bell, a social scientist, who testified regarding a public opinion poll (survey) he had conducted of 800 adults in Illinois to determine community standards in obscenity cases. For this survey, Bell used a questionnaire designed to sample and report the attitude of adults living in Illinois toward the depiction of sexually explicit material. Bell made a comparison of the 1983 survey with others he conducted in 1978 and 1980, involving virtually the same questionnaire, pointing out that the results of the surveys showed that a larger percentage of those surveyed in 1983 than in 1980 and 1978 found sexually explicit materials acceptable for the average adult.

On cross-examination, Bell stated that although one of the questions on the questionnaire concerned changing standards toward sexually explicit materials, the people surveyed were not questioned regarding what they believed to be the current standard. Additionally, the manner in which an individual answered certain questions would depend on that person's idea of what constituted sexually explicit materials as well as his life experiences with such materials.

At the jury instruction conference the State objected to defendant's instruction No. 5 relating to proof of contemporary community standards. The bases for the State's objections were that it was a non-IPI instruction, that it called undue attention to community standards' evidence, and that it was repetitive of defendant's instruction No. 3.

The court denied the instruction, commenting that it singled out one piece of evidence (the survey) to the exclusion of all other evidence.

The jury found defendant guilty of obscenity. Defendant filed a motion for judgment notwithstanding the verdict, or, alternatively, for a new trial which was denied.

At the sentencing hearing the State presented no evidence in aggravation. Catherine Hall, defendant's wife, testified in defendant's behalf, relating that the couple had two children and were expecting another child; that defendant's parents lived with the couple; that neither she nor her husband was presently employed; that the only income the couple had was unemployment insurance; and that her husband had never been convicted of any other crime. Defendant presented no other evidence in mitigation. The State sought the maximum sentence allowed under the obscenity statute, 364 days' imprisonment and a fine of $1,000. Since defendant was the manager of the bookstore at the Sunset Outdoor Theater rather than just a clerk, the State specifically asked the court to consider a sentence which would deter others from committing the same offense as defendant. Defense counsel stressed that defendant was a first time offender, that the offense of which defendant had been found guilty was a Class A misdemeanor, and that the appropriate penalty was a monetary one. The court imposed a sentence of 140 days' imprisonment and a fine of $1,000. This appeal followed.

Defendant first contends that the State is compelled to do more to sustain a conviction for obscenity than introduce the allegedly obscene magazine into evidence when

a defendant introduces public opinion evidence regarding community standards. Defendant maintains that because the State, in the instant case, failed to introduce any other evidence, it failed to meet its burden of proof.

The results of Bell's public opinion survey reflected a greater acceptance by the public of "sexually explicit" materials. However, greater acceptance of "sexually explicit" materials by the public does not indicate greater acceptance of obscene material. The questions in Bell's survey referred to "sexually explicit" materials and, as the State points out, material which is sexually explicit is not obscene unless it meets the standards in *People v. Ridens* (1974), 59 Ill. 2d 362, 321 N.E.2d 264. *Ridens* sets forth three requirements in determining the obscenity of public material: (1) that the material taken as a whole appeals to a prurient interest in sex; (2) that the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (3) that the material be utterly without redeeming social value. (59 Ill. 2d 362, 372-73, 321 N.E.2d 264.) None of the questions in Bell's questionnaire was designed to disclose the community's opinion regarding materials which met these requirements. Thus, contrary to defendant's apparent belief, the survey results are not conclusive as to whether the magazine in question would be acceptable according to Statewide community standards regarding obscene materials.

Defendant also argues that, in light of the evidence he introduced regarding contemporary community standards, Illinois should no longer allow the State to rely strictly on

jurors, such as these in the instant case, to be the "exclusive judges" of contemporary standards. Defendant's argument, here, appears to be that the jurors, residents of Winnebago County, were isolated from the "outside world." In other words, these jurors were lacking the background and experience to fairly evaluate material alleged to be sexually explicit. However, the transcript of the *voir dire* shows that the jurors selected possessed some familiarity with sexually explicit magazines. Moreover, during the *voir dire*, prospective jurors were questioned regarding their knowledge of community standards towards sexually explicit materials and their willingness to apply these standards. Those jurors who displayed any difficulty in applying community, as opposed to personal, standards in evaluating the magazine in question were excused by defense counsel. Also during *voir dire*, the State's closing argument, and the instructions given to the jury, emphasis was placed on the fact that the jurors were not to apply their personal standards in finding the magazines obscene but rather a community standard for the State of Illinois. Because the jury failed to decide the case as defendant wished, by adopting the standard Bell maintained his survey established, does not mean that the jury did not apply any community standard at all or that it decided incorrectly. It was the duty of the jury which heard and saw all of the evidence presented to pass on the credibility of the witnesses, to weigh the evidence, and to draw all reasonable inferences therefrom; a reviewing court may not substitute its judgment simply because it would have decided differently. *People v. Pope* (1985), 138 Ill. App. 3d 726, 743, 486 N.E.2d 350; *Koris v. Norfolk & Western Ry. Co.* (1975), 30 Ill.App. 3d 1055, 1058, 333 N.E.2d 217.

It is unlikely, however, that this court would have decided differently. One glance at the covers of the magazine in question would be sufficient to establish its sexual explicitness. That the magazine also satisfies the requirements of *People v. Ridens* (1974), 59 Ill. 2d 362, 372-73, 321 N.E.2d 264, thereby establishing its obscenity, is apparent from an examination of the magazine's prose and pictures. Contrary to defendant's contention that the magazine depicts mild sexual content, the magazine is replete, both pictorially and verbally, with the various positions and attempted contacts two male individuals performed in inserting and manipulating their genitals. Clearly, the magazine itself demonstrates that the State met its burden in proving defendant was guilty beyond a reasonable doubt of obscenity and that the jury's determination of his guilt was correct.

Defendant's second contention is that the trial court erred in refusing to tender defendant's instruction No. 5 which related to evidence of community standards. Defendant's instruction No. 5 reads as follows:

> "In the absence of evidence relating to contemporary community standards brought by the defendant, the trier[s] of fact are the exclusive judges of what are the contemporary community standards.
>
> However, when the defendant provides evidence, such as survey evidence, pertaining to contemporary community standards, the jury must consider all competent evidence presented pertaining to what, if any, community standards exist."

Defendant maintains that the court's refusal to tender this instruction to the jury constituted reversible error.

At the jury instruction conference the State set forth three reasons for its objection to the giving of instruction

No. 5: (1) the instruction was a non-IPI instruction; (2) the instruction called undue attention to community standards evidence; and (3) the instruction recapitulated another instruction of defendant's which was to be given to the jury.

A non-IPI instruction should be used only if a pattern instruction does not contain an accurate instruction on the subject that the jury should be instructed upon and if the tendered non-IPI instruction is simple, brief, impartial and free from argument. (87 Ill. 2d R. 451 (a); *People v. Wolfe* (1983), 114 Ill. App. 3d 841, 852, 449 N.E. 2d 980.) We believe instruction No. 5 is argumentative because it singles out a piece of evidence, Bell's public opinion survey on sexually explicit materials, as the most important evidence in the case. Thus, on this basis alone, this court concludes the judge was correct in refusing the instruction. See *People v. Pope* (1985), 138 Ill. App. 3d 726, 741, 486 N.E.2d 350.

Moreover, as the State points out, the court did tender defendant's instruction No. 3 to the jury which specifically directed the jurors to refrain from applying their own personal standards in determining whether the magazine in question was obscene. Rather, the jurors were instructed to determine how the magazine would be viewed by ordinary adults in the whole State and not just by people in a single city, town, or region. Thus, instruction No. 3 categorically defined the extent of the "community" by which the standard was to be measured and charged the jury not to adopt a "community" lesser than Statewide. Clearly, this instruction echoed that of instruction No. 5 and, therefore, the court was correct in refusing it, as

repetitive instructions are not favored and should be avoided. (*People v. O'Shaughnessy* (1981), 102 Ill. App. 3d 966, 973, 430 N.E.2d 325; *People v. Looney* (1977), 46 Ill. App. 3d 404, 411, 361 N.E.2d 18.) Also, as the State points out in its brief, the IPI instruction (Illinois Pattern Jury Instructions (IPI), Criminal, No. 9.57 (2d ed. 1981)), which was tendered to the jury as defendant's instruction No. 3, was modified by defendant to emphasize that community standards rather than personal standards must be used in determining if the magazine in question was obscene. We conclude, therefore, it was not error for the trial court to refuse to tender defendant's instruction No. 5.

Next, defendant contends that the trial court erred in permitting the State to cross-examine defendant's expert psychiatric witness regarding the prurient appeal of individual photographs in the magazine. Defendant asserts that it was reversible error for the trial court to permit the prosecutor to ask, during cross-examination of Dr. Hamann, a physician specializing in psychiatry, whether specific photographs in the magazine appealed to prurient interests. It is defendant's position that this cross-examination emasculated the legal definition of obscenity.

In Illinois, obscenity is determined by a three-part test. (*People v. Ridens* (1974), 59 Ill. 2d 362, 372-73, 321 N.E.2d 264.) The first element of the tripartite definition is whether the material, considered as a whole, has, as its predominant appeal, an appeal to prurient interests, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion. This portion of the definition clearly indicates that the material in question must be "considered as a whole."

However, as the trial court emphasized, in overruling defendant's objections to the prosecutor's questions regarding individual photographs within the magazine, the "whole" of the material is the sum of its parts. Thus, in determining if material is obscene, the individual parts, the pictures and prose, should be considered.

Here, this court believes it is obvious from the magazine's photographs and prose regarding the sexual encounter of two male individuals that the magazine, taken as a whole, appeals to prurient interests. Admittedly, some photographs within the magazine have more prurient appeal than others, but Dr. Hamann was asked by the prosecutor to go through the entire magazine "page by page, looking at each page, each picture, and tell me if there is [sic] any pages in there or pictures that would appeal to the prurient interests of an individual." Additionally, the court emphasized that if the prosecutor was going to ask Hamann's opinion regarding the photographs within the magazine, the prosecutor was going to have to go through the magazine substantially. We believe the prosecutor's questions centering upon the magazine's photographs indicate that he was asking Dr. Hamann his opinion regarding the prurient appeal of the entire magazine.

What constitutes permissible cross-examination is for the trial court to determine, and its decision will not be upset on appeal unless that discretion has been abused and results in apparent prejudice to the defendant. (*People v. Blakes* (1976), 63 Ill. 2d 354, 358, 348 N.E.2d 170; *People v. Hunter* (1984), 124 Ill. App. 3d 516, 538, 464 N.E.2d 659.) In our opinion, the trial court's ruling did not constitute an abuse of discretion nor did it result in prejudicing the defendant. Nevertheless, even if we were to

determine that it was error for the trial court to permit this line of questioning, we would find the error to be harmless. Hamann never admitted during cross-examination that any of the magazine's photographs appealed to a prurient interest. According to Hamann, the photographs would only satisfy a normal curiosity in the average individual and no one photograph was "any more explicit or any more likely to attract a prurient interest than any of the others." Thus, we believe Hamann's appraisal of the photographs demonstrates that any questions regarding his opinion concerning the prurient appeal of the pictures were harmless. We conclude, therefore, that the trial court's allowance of this line of questioning by the prosecutor did not constitute reversible error.

Defendant's fourth contention is that the trial court abused its discretion in imposing a sentence of 140 days' incarceration upon defendant. Defendant maintains that he was improperly sentenced to 140 days' imprisonment because: (1) the trial court was predisposed to incarcerate obscenity defendants; (2) the sentence was disproportionate to sentences imposed upon other obscenity defendants; and (3) the sentence was intended as a prior restraint on communicative activity.

Defendant claims that the sentencing judge disfavored obscenity defendants and was predisposed to sentence such defendants to jail. This claim is largely based on remarks made by the trial judge in sentencing defendant. The trial judge referred to an appellate opinion of this court in an obscenity case involving this same judge, wherein the judge had sentenced a defendant, similarly

situated to this defendant, to a term of imprisonment. Contrary to defendant's contention that the remarks by the trial judge illustrated the judge's predisposition to incarcerate obscenity defendants and the judge's failure to consider even the possibility of probation as required by law (Ill. Rev. Stat. 1983, ch. 38, par. 1005-6-1), we are of the same opinion as the State, *i.e.*, that the remarks were intended to show that precedent existed for imprisoning defendants convicted of nonviolent crimes who had led a prior good life.

Defendant claims that the trial judge undertook no analysis of the factors necessary to make a sentencing decision (Ill. Rev. Stat. 1983, ch. 38, par. 1005-4-1(a)), and that his pronouncement of sentence demonstrated that he had given no consideration to probation, conditional discharge, or supervision as viable alternatives for this first-time offender who had committed a nonviolent crime. We note, however, that defendant never sought these alternatives in the lower court but merely asked that, as his punishment, a fine be imposed.

The record shows that the factors necessary to make a sentencing decision were present for the court's consideration. First of all, the judge, like the jury, heard and saw all of the evidence presented. Additionally, at the sentencing hearing, the judge heard mitigation evidence in the form of testimony by defendant's wife. The judge also heard argument as to sentencing alternatives. The State argued for the maximum sentence of 364 days and a fine of $1,000, stressing the fact that defendant was not a simple clerk, but the manager of the Sunset Theater and that the imposition of a severe punishment might

deter others from wanting to manage such establishments. Defense counsel argued that defendant was a mere employee of a drive-in theater who had been found guilty of a Class A misdemeanor and that, as a first-time offender, the appropriate penalty was a monetary one.

In sentencing the defendant, the judge's comments included his recitation from *People v. Hobbs* (1978), 59 Ill. App. 3d 793, 804, 375 N.E.2d 1367, *cert. denied* (1979), 440 U.S. 976 59 L. Ed. 2d 795, 99 S. Ct. 1547, that a court may reach a decision that probation would deprecate the seriousness of the offense and that, in so determining, the court may examine all of the surrounding circumstances, drawing reasonable inferences therefrom. This court's reading of the judge's references to *Hobbs* is that the judge was adopting his own remarks from *Hobbs* as his basis for sentencing this defendant to a term of incarceration.

Sections 1005-6-1(a)(1) and (2) of the Unified Code of Corrections (Ill. Rev. Stat. 1983, ch. 38, pars. 1005-6-1 (a)(1) and (2)) establish that a trial court may not deny probation or conditional discharge unless the court is of the opinion that a defendant's imprisonment is necessary for the protection of the public or that probation or conditional discharge would deprecate the seriousness of defendant's conduct and would be inconsistent with the ends of justice. However, it is well established that the trial court does not have to expressly recite that "imprisonment is necessary for the protection of the public" or that "probation or conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice" to establish substantial

compliance with sections 1005-6-1(a)(1) or (2). (See *People v. Cox* (1980), 82 Ill. 2d 268, 281, 412 N.E.2d 541; *People v. Roberts* (1983), 115 Ill. App. 3d 384, 388, 450 N.E.2d 451.) Here, the judge's reference to the *Hobbs* case was, in our view, sufficient to establish substantial compliance and leads us to conclude that the trial judge did not arbitrarily deny defendant a lesser sentence than imprisonment, but rather imposed a sentence which was clearly within the statutory limitations for a defendant convicted of a Class A misdemeanor and which was also aimed at deterring others.

Next, defendant contends his sentence was improper because it was disproportionate to the seriousness of the crime and, thus, constituted an extreme penalty. Defendant was convicted of a Class A misdemeanor, an offense for which he could have received a penalty of up to 364 days in jail. Defendant lists, in his brief, obscenity cases for which fines were largely imposed rather than terms of imprisonment. But, as defendant himself notes, few of these cases reflect the individual backgrounds or records of the defendants sentenced. Thus, no valid comparison can be made as to why these defendants received fines while the defendant in the instant case received a term of imprisonment. Moreover, in every criminal case, the penalty imposed must be determined on an individual basis. *People v. Shook* (1980), 86 Ill. App. 3d 174, 179, 407 N.E.2d 976.

The record in the case at bar establishes that it was known to the sentencing judge that the defendant had no prior criminal record. Nevertheless, terms of imprisonment for defendants convicted of obscenity but possessing

"exemplary" records have been previously upheld by this court. (See *People v. Hobbs* (1978), 59 Ill. App. 3d 793, 804, 375 N.E.2d 1367, *cert. denied* (1979), 440 U.S. 976, 59 L. Ed. 2d 795, 99 S. Ct. 1547.) It was also known to the judge that defendant was the manager of the Sunset Outdoor Theater and not merely a clerk. In light of this fact, it is not unreasonable to conclude that defendant's incarceration was intended to specifically discourage others from desiring to manage establishments which furnish obscene materials. Moreover, as we have concluded above, the trial judge considered the deterrence of others when he pronounced his sentence upon the defendant. As deterrence of others is properly considered in imposing a sentence in excess of the minimum (*People v. Griffin* (1981), 94 Ill. App. 3d 165, 167, 418 N.E.2d 817), we find that defendant's sentence was not excessive and not the result of an abuse of the trial court's discretion.

Defendant also claims that the imposition of a period of incarceration was intended as a prior restraint because the sentence was designed to curb the communicative activities of bookstores or theaters selling and exhibiting materials presumptively protected by the First Amendment. This contention, however, is easily disposed of by reference to the United States Supreme Court's decision in *Southeastern Promotions, Ltd. v. Conrad* (1975), 420 U.S. 546, 43 L. Ed. 2d 448, 95 S. Ct. 1239, wherein the Supreme Court established that a prior restraint occurs when, without any judicial determination, a communication is characterized as obscene and suffers a detriment to its further communication. As the State correctly points out in its brief, the defendant here was not restrained from selling the magazine in question. Also, the material

was not deemed obscene until after a judicial proceeding on its contents was held. Thus, unless it can be shown that the sentence by the trial judge in the instant case was designed to censor material prior to a judicial determination that the material is unprotected by the First Amendment, then it cannot be concluded that the sentence constituted a prior restraint. Clearly, the record here does not indicate that this was the situation in this case. Thus, we are convinced that the trial court's imposition of a period of incarceration was not an attempt by the court to impose a prior restraint.

The determination and imposition of a suitable sentence is a matter involving considerable discretion and the trial judge's decisions pertaining to sentencing are entitled to great deference and weight. (*People v. Perruquet* (1977), 68 Ill. 2d 149, 154, 368 N.E.2d 882; *People v. Jordan* (1985), 130 Ill. App. 3d 810, 814, 474 N.E.2d 1283.) Upon review, it is our function to determine whether the trial court exercised that discretion and whether it abused that discretion in imposing sentence. (*People v. Kuesis* (1980), 83 Ill. 2d 402, 408, 415 N.E.2d 323.) Based on the record before this court, we cannot conclude that the sentencing decision by the trial court was an abuse of discretion.

Defendant's final contention is that the Illinois obscenity statute is unconstitutional. In this court the defendant sets forth a number of reasons why the Illinois obscenity statute is unconstitutional, nearly all of which have been recently proposed to, addressed by, and rejected by this court in *People v. Pope* (1985), 138 Ill. App. 3d 726, 486 N.E.2d 350. Here, we reach the same conclusions we previously reached in *Pope*.

Defendant first contends that the Illinois obscenity statute (Ill. Rev. Stat. Rev. Stat. 1983, ch. 38, par. 11-20) is unconstitutional because it is vague and overbroad and denies rights and privileges guaranteed under the first and fourteenth amendments to the Constitution of the United States. However, the Illinois Supreme Court has consistently held that the obscenity statute is not impermissibly vague or overbroad, that prohibitions are clear, and that it does not invade areas of personal freedom. *People v. Ridens* (1974), 59 Ill. 2d 362, 321 N.E.2d 264; *People v. Ward* (1976), 63 Ill. 2d 437, 441, 349 N.E.2d 47.

Defendant relies on *State v. Princess Cinema of Milwaukee, Inc.* (1980), 96 Wis. 2d 646, 292 N.W.2d 807, to support his claim that the Illinois Legislature needs to redefine obscenity. In *Princess Cinema,* the Wisconsin Supreme Court refused to further judicially construe the Wisconsin obscenity statute and called upon the Wisconsin legislature to redefine obscenity so as to agree with the most recent United States Supreme Court cases in the area of obscenity. Defendant argues that, like the Wisconsin obscenity statute, the Illinois obscenity statute has a long history of judicial reconstruction and, therefore, should be redefined. However, Illinois courts have never been reluctant to construe the constitutionality of the Illinois obscenity statute and, thus, defendant's argument here appears to have little merit. Moreover, the decision of a reviewing court from another State that it will no longer judicially construe its State obscenity statute is not precedentially binding on this court. *Ladd Construction Co. v. Insurance Co. of North America* (1979), 73 Ill. App. 3d 43, 47, 391 N.E.2d 568.

Defendant also argues that this court should declare the Illinois obscenity statute unconstitutional and in need of legislative revamping because there still remain unanswered questions regarding its construction. First, defendant mentions that no Illinois court has ever ruled on whether the third element of the test for obscenity, *i.e.*, whether the work is "utterly without redeeming social value," should be adjudged on an objective basis or by an application of Statewide community standards. However, as the State correctly points out in its brief, defendant never specifically explains how this issue arises in the instant case. Defendant never argued below that an objective standard should be applied in adjudging whether the magazine in question was "utterly without redeeming social value." Rather, defendant himself stressed the application of a Statewide community standard when he tendered his IPI instruction defining obscenity, an instruction which he had modified to specifically instruct the jury that it was to apply a community standard.

Additionally, defendant raises the issue of including children in determining the relevant community standard, contending that is is questionable whether children should be considered part of the relevant community. The Illinois obscenity statute specifically sets forth when children can be considered part of the community. Section 11-20(c) of the statute states that "[o]bscenity shall be judged with reference to ordinary adults ***" and that children should be considered as part of the relevant community only when the allegedly obscene materials are designed or directed to children. (Ill. Rev. Stat. 1983, ch. 38, par. 11-20(c).) Therefore, because the Illinois obscenity statute clearly establishes that children are to be included in determining

a Statewide community standard only when they are the intended recipients of the allegedly obscene materials at issue in a case, defendant's contention that that question remains unanswered is without merit.

Finally, we note, as we did in *People v. Pope* (1985), 138 Ill. App. 3d 726, 486 N.E.2d 350, that "since the Illinois Supreme Court has declared the Illinois obscenity statute to be constitutional, the defendant is in the wrong forum for the relief he seeks. When the supreme court of this State has declared the law in any point, only it can overrule and modify its opinion, and an appellate court is bound by its decision." 138 Ill. App. 3d 726, 736, 486 N.E.2d 350; *Village of Morton v. Thomas* (1983), 116 Ill. App. 3d 676, 680, 452 N.E.2d 865; *People v. Tannahill* (1976), 38 Ill. App. 3d 767, 770-71, 348 N.E.2d 847.

For all of the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed.

AFFIRMED.

NASH, P.J., and LINDBERG, J., concur.

EXHIBIT B

APPELLATE COURT
SECOND DISTRICT OF ILLINOIS

General Number 2-85-231

May 5, 1986

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

JOHN LYLE HALL,

Defendant-Appellant.

Appeal from the Circuit Court for the 17th Judicial Circuit, Winnebago County, Illinois.

Honorable John Nielsen, Judge Presiding

It is hereby ordered that the Opinion heretofore filed herein is modified by deleting the word "public" on page 7, the 4th line from the top of the page.

The Court having considered the Petition for Rehearing filed by the Defendant-Appellant in the above entitled cause, and being now sufficiently advised of and concerning the premises, it is ordered that said Petition be denied.

/s/ Loren J. Strotz,
Clerk

EXHIBIT C

63641

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK

Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035
October 2, 1986

Mr. John Steven Beckett
Reno, O'Byrne & Kepley
501 West Church St.
Champaign, IL 61820

No. 63641—People State of Illinois, respondent, v. John Lyle Hall, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1986.

EXHIBIT D

No. 63641

IN THE
SUPREME COURT OF ILLINOIS

People State of Illinois,

Respondent,

v.

John Lyle Hall,

Petitioner.

Appeal From Appellate Court Second District
AC2-85-0231

ORDER

This matter has come for consideration upon the motion of petitioner to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

/s/ Thomas Moran
Justice, Supreme Court of Illinois

EXHIBIT E

First Amendment
Constitution of the United States

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment
Constitution of the United States

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

EXHIBIT F

Illinois Obscenity Statute
Ill.Rev.Stat. (1983) ch. 38, § 11-20

11-20. Obscenity

§ 11-20. Obscenity. (a) Elements of the Offense.

A person commits obscenity when, with knowledge of the nature or content thereof, or recklessly failing to exercise reasonable inspection which would have disclosed the nature or content thereof, he:

(1) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(5) Creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction; or

(6) Advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene.

(b) Obscene Defined.

A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful

or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. A thing is obscene even though the obscenity is latent, as in the case of undeveloped photographs.

(c) Interpretation of Evidence.

Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience.

Where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that material is being commercially exploited for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

In any prosecution for an offense under this Section evidence shall be admissible to show:

(1) The character of the audience for which the material was designed or to which it was directed;

(2) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect if any, it would probably have on the behavior of such people;

(3) The artistic, literary, scientific, educational or other merits of the material, or abscence thereof;

(4) The degree, if any, of public acceptance of the material in this State;

(5) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material;

(6) Purpose of the author, creator, publisher or disseminator.

(d) Sentence.

Obscenity is a Class A misdemeanor. A second or subsequent offense is a Class 4 felony.

(e) Prima Facie Evidence.

The creation, purchase, procurement or possession of a mold, engraved plate or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of obscene material shall be prima facie evidence of an intent to disseminate.

(f) Affirmative Defenses.

It shall be an affirmative defense to obscenity that the dissemination:

(1) Was not for gain and was made to personal associates other than children under 18 years of age;

(2) Was to institutions or individuals having scientific or other special justification for possession of such material.

Amended by P.A. 77-2638, § 1, eff. Jan. 1, 1973.

EXHIBIT G

Amended Illinois Obscenity Statute
Ill.Rev.Stat. (1985) ch. 38, § 11-20
(effective January 1, 1986)

§ 11-20 (b) Obscene Defined.

Any material or performance is obscene if: (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

Amended by P.A. 84-709, § 1, eff. Jan. 1, 1986.

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN LYLE HALL,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner has presented a question worthy of review by this Court when: (1) he waived the right to review on this issue by not properly raising it at trial; and (2) two cases pending before this Court present the same issue.

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In The

Supreme Court of the United States

October Term, 1986

JOHN LYLE HALL,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Second District

RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

The respondent asks this Court to deny the petition for writ of certiorari to review the decision of the Appellate Court of Illinois, Second District, because petitioner has not presented a question worthy of review by this Court.

OPINION BELOW

The petitioner seeks review from an Illinois Appellate Court, Second District, opinion in *People v. Hall*, No. 2-85-231 (2nd Dist. 1986). A copy of the opinion is included

with the petition as Appendix A. The petition for rehearing by that court was denied on May 5, 1986, and petitioner's leave to appeal to the Illinois Supreme Court was denied on October 2, 1986 (see Appendices B and C to the petition).

JURISDICTION

The petition for certiorari sets forth the jurisdictional requisites, at page 1 of the petition. However, for the reasons set forth in the following argument petitioner has failed to demonstrate why this Court should exercise its judicial discretion and grant the petition for writ of certiorari.

STATEMENT OF FACTS

In addition to those facts set forth in the Statement Of The Case in the petition for a writ of certiorari at pages 2-4, the respondents note the following fact. In deciding the direct appeal from petitioner's conviction for obscenity, the Illinois Appellate Court, Second District, held as follows:

> Defendant also argues that this court should declare the Illinois obscenity statute unconstitutional and in need of legislative revamping because there still remain unanswered questions regarding its construction. First, defendant mentions that no Illinois court has ever ruled on whether the third element of the test for obscenity, *i.e.*, whether the work is "utterly without redeeming social value," should be adjudged on an objective basis or by an application

of Statewide community standards. However, as the State correctly points out in its brief, defendant never specifically explains how this issue arises in the instant case. Defendant never argued below that an objective standard should be applied in adjudging whether the magazine in question was "utterly without redeeming social value." Rather, defendant himself stressed the application of a Statewide community standard when he tendered his IPI instruction defining obscenity, an instruction which he had modified to specifically instruct the jury that it was to apply a community standard.

Appendix to the Petition, App. 20.

REASONS FOR DENYING THE WRIT OF CERTIORARI

THE PETITIONER HAS NOT PRESENTED A QUESTION WORTHY OF REVIEW BY THIS COURT

A. Petitioner Has Waived The Right To Review On This Issue By Not Raising It At Trial.

There is no indication from either the petition or from the Illinois Appellate Court opinion that petitioner ever tendered a jury instruction requiring the third part of the Illinois obscenity statute to be adjudged by an objective standard. As petitioner concedes, he only tendered jury instructions which applied community standards to the Illinois obscenity statute, which are the same standards he now argues against. Further, there is no indication from the petition or from the Illinois Appellate Court opinion that petitioner objected to the community standards instruction at the jury instruction conference.

The Illinois Appellate Court chose not to address the issue, stating,

> Defendant also argues that this court should declare the Illinois obscenity statute unconstitutional and in need of legislative revamping because there still remain unanswered questions regarding its construction. First, defendant mentions that no Illinois court has ever ruled on whether the third element of the test for obscenity, *i.e.*, whether the work is "utterly without redeeming social value," should be adjudged on an objective basis or by an application of Statewide community standards. However, as the State correctly points out in its brief, defendant never specifically explains how this issue arises in the instant case. Defendant never argued below that an objective standard should be applied in adjudging whether the magazine in question was "utterly without redeeming social value." Rather, defendant himself stressed the application of a Statewide community standard when he tendered his IPI instruction defining obscenity, an instruction which he had modified to specifically instruct the jury that it was to apply a community standard.
>
> Appendix to the Petition, App. 20.

Illinois law is clear on this issue. Failure to object to jury instructions at the time of trial waives the question. *People v. Tannenbaum*, 82 Ill.2d 177, 180, 415 N.E.2d 1027, 1029 (1980), *People v. Roberts*, 75 Ill.2d 1, 10, 387 N.E.2d 331, 335 (1979). Further, on appeal, one cannot raise as error the failure of the court to give a certain jury instruction unless he tendered it at trial. *People v. Tannenbaum*, 82 Ill.2d 177, 180, 415 N.E.2d 1027, 1029 (1980), *People v. Underwood*, 72 Ill.2d 124, 129, 378 N.E.2d 513, 515 (1978).

The purpose of the waiver rule is so that errors can be corrected at trial before the instructions are given and

so that the party failing to object does not gain an advantage of obtaining a reversal due to his own failure to object. *People v. Roberts*, 75 Ill.2d 1, 11, 387 N.E.2d 331, 336 (1979).

In summary, defendant waived this issue by not objecting at trial to the instruction given and by not tendering the instruction he now claims should have been given. Further, he actually stressed the application of the community standard by tendering instructions with that standard.

B. This Court Already Has Two Cases Pending Before It Which Present The Same Issue.

This case presents an unnecessary burden on the Court to review an issue which is currently before this Court. This Court granted certiorari in the consolidated case of *Pope v. Illinois*, ____ U.S. ____, 107 S.Ct. 61 (1986) involving the same issue as Petitioner brings before this Court in the present case.

In both cases consolidated in *Pope* and in the present case, an employee of an adult bookstore was convicted of the offense of obscenity. The constitutional issue before the Court in both *Pope* and the instant case is the same: whether the third prong of the obscenity test set out in *Miller v. California*, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973) should be adjudged on a community standard or on an objective standard.

Since this issue is already properly before this Court there is no need to review it again in a case wherein doubt exists as to whether this constitutional claim has properly been preserved for review (see Argument A, *supra*).

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to deny the petition because the issue it presents is not worthy of review by this Court.

Respectfully submitted,

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